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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION

- and -

**PACIFIC GAS AND
ELECTRIC COMPANY,**

Debtors.

Bankruptcy Case
No. 19 – 30888 (DM)
Chapter 11
(Lead Case)
(Jointly Administered)

**ESVOLTA, LP'S MOTION UNDER 11
U.S.C. §§ 105(a) AND 107(b) AND FRBP
9018 FOR ENTRY OF AN ORDER
AUTHORIZING THE FILING OF
CERTAIN CONTRACTS AND RELATED
FILINGS UNDER SEAL**

- ☐ Affects PG&E Corporation
☒ Affects Pacific Gas and Electric
Company
☐ Affects both Debtors

***All papers shall be filed in the Lead
Case, No. 19-30088 (DM)**

Hearing Date: **April 10, 2019**
Time: **9:30 a.m.**
Courtroom: Hon. Dennis Montali
450 Golden Gate Avenue
16th Floor, Courtroom 17
San Francisco, CA 94102

Objections Due: **April 3, 2019, 4:00 p.m.**

1 esVolta, LP (“esVolta”) hereby moves (this “Motion”), pursuant to Sections 105(a) and
2 107(b) of title 11 of the United States Code (the “Bankruptcy Code”), Rule 9018 of the Federal
3 Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), Rule 1001-2(a) of the Bankruptcy
4 Local Rules for the United States District Court for the Northern District of California (the
5 “Bankruptcy Local Rules”), and the *New District Wide Procedures for Electronically Filing*
6 *Sealed and Redacted Documents* adopted by the United States Bankruptcy Court for the
7 Northern District of California (the “Local Procedures”), for entry of an order (i) authorizing
8 esVolta to file under seal the PPA (*as defined below*) related to esVolta’s *Motion for Entry of an*
9 *Order Confirming Safe Harbor Protection Under 11 U.S.C. §§ 362(b)(6) and 556* (the “Safe
10 Harbor Motion”),¹ filed contemporaneously herewith, as well as certain portions of the Safe
11 Harbor Motion and the Mann Declaration (the “Motion Papers”) that refer to confidential details
12 contained in the PPA, and (ii) directing that the PPA and unredacted copies of the Motion
13 Papers will remain under seal and confidential and not be made available to anyone without the
14 consent of esVolta and the other parties to the PPA or further order from the Court.

15 A proposed form of order is attached hereto as Exhibit A, in accordance with the
16 Local Procedures (the “Proposed Order”).

17 The Motion is based on this Memorandum of Points and Authorities, the concurrently
18 filed Safe Harbor Motion, the concurrently filed Mann Declaration, the complete files and
19 records of the referenced matters, the arguments of counsel, and such other and further
20 matters as this Court may consider at or before any hearing on this Motion. esVolta notes that
21 this motion is substantially similar to *Enel Green Power North America’s Motion Under 11*
22 *U.S.C. §§105(a) and 107(b) and FRBP 9018 for Entry Of An Order Authorizing The Filing*
23 *Of Certain Contracts and Related Filings Under Seal* [Dkt. No. 483] (the “Enel Motion”),
24 which motion concerns a substantially similar energy storage resource adequacy agreement
25 procured by PG&E under an earlier resource adequacy procurement and seeks the same relief
26 from the Court sought herein.

28 ¹ Capitalized terms used but not defined in this Motion shall have the meaning used in the Safe Harbor Motion.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 Hummingbird Energy Storage, LLC ("Hummingbird"), a wholly-owned subsidiary of
4 esVolta, LP ("esVolta"), is party to an Energy Storage Resource Adequacy Agreement (the
5 "PPA") with Pacific Gas and Electric Company ("PG&E," and together with PG&E
6 Corporation, the "Debtors"). esVolta has filed a *Motion for Entry of an Order Confirming Safe*
7 *Harbor Protection Under 11 U.S.C. §§ 362(b)(6) and 556* (the "Safe Harbor Motion") seeking
8 an order determining that Hummingbird's exercise of its contractual rights under the PPA is
9 protected by the safe harbor provision of Sections 362(b)(6) and 556 of the Bankruptcy Code,
10 as well as a declaration in support thereof (the "Mann Declaration," and together with the Safe
11 Harbor Motion, the "Motion Papers"). Both esVolta and PG&E have agreed to stringent
12 confidentiality clauses in the PPA, and esVolta respectfully requests that the Court allow
13 esVolta to submit the PPA, as well as unredacted versions of the Motion Papers that reference
14 confidential details in the PPA, under seal so that the matter of safe harbor protection can be
15 adequately adjudicated without violating the confidence of PG&E and esVolta regarding the
16 terms of their agreement.

17 **II. JURISDICTION**

18 This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334,
19 the *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General
20 Order 24 (N.D. Cal.), and Bankruptcy Local Rule 5011-1(a). This is a core proceeding
21 pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
22 The bases for the relief requested in the Motion are §§ 105(a) and 107(b) of the Bankruptcy
23 Code and Bankruptcy Rule 9018.

24 **III. FACTS**

25 Hummingbird is party to the PPA with PG&E dated June 1, 2018, with a delivery term of
26 fifteen years. The PPA encompasses two phases: (i) the development of a lithium ion battery
27 energy storage facility in the Coyote Valley area of San Jose, California (the "Facility," and (ii)
28 providing resource adequacy capacity to PG&E from the Facility, to enable PG&E, *inter alia*, to

1 meet its resource adequacy and renewable energy requirements prescribed by the California
2 Public Utilities Commission (“CPUC”).

3 Additional information regarding Hummingbird’s business and commercial agreements
4 with PG&E is set forth in the Safe Harbor Motion and the Mann Declaration.

5 The PPA contains a provision stating that throughout the term of the agreement, “neither
6 party shall disclose the non-public terms or conditions of this Agreement or the Parties’ bidding
7 or negotiation process ... to a third-party.”²

8 When PG&E filed the application for approval of the PPA with the CPUC (Advice
9 Letter 5322-E), PG&E claimed the PPA was confidential in its entirety, and the PPA was filed
10 under seal.

11 As the PPA contains sensitive and confidential commercial information, esVolta
12 respectfully requests that the Court permit esVolta to file the PPA under seal, and the Motion
13 Papers in redacted form, to ensure that the PPA is not publicly disclosed in violation of their
14 confidentiality provisions.

15 **IV. BASIS FOR RELIEF REQUESTED**

16 Under Section 105(a) of the Bankruptcy Code, the Court is allowed to “issue any order
17 ... that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).
18 Section 107(b) provides that, “[o]n request of a party in interest, the bankruptcy court shall, and
19 on the bankruptcy court’s own motion, the bankruptcy court may ... [p]rotect an entity with
20 respect to a trade secret or confidential research, development, or commercial information.” 11
21 U.S.C. § 107(b).

22 An entity seeking protection under Section 107(b) need only show that the information it
23 seeks to seal is “confidential” and “commercial” in nature. *Video Software Dealers Ass’n v.*
24 *Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994). Commercial information has been defined
25 as information that would produce “an unfair advantage to competitors by providing them with
26 information as to the commercial operations” of the entity seeking protection. *In re Itel Corp.*,

27
28 ² See Energy Storage Resource Adequacy Agreement between Pacific Gas and Electric Company (as Buyer) and
Hummingbird Energy Storage, LLC (as Seller), executed June 1, 2018, Article 19.1 Confidential Information.

1 17 B.R. 942, 944 (9th Cir. B.A.P. 1982). Commercial information does not need to be a trade
2 secret to fall under Section 107(b)'s protection. *See Orion Pictures Corp.*, 21 F.3d at 28 (finding
3 that § 107(b) was carefully drafted to avoid merging "trade secrets" with "confidential
4 commercial information").

5 Under the Bankruptcy Rules, the Court is similarly authorized to "make any order which
6 justice requires ... to protect the estate or any entity in respect of a trade secret or other
7 confidential research, development, or commercial information." Fed. R. Bankr. P. 9018.
8 Similarly, the Local Procedures require that a request to file under seal be narrowly tailored to
9 sealable materials. *New District Wide Procedures for Electronically Filing Sealed and Redacted*
10 *Documents*.

11 Because the PPA contains confidential commercial information within the scope of
12 Section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, the Court should grant
13 esVolta's request.

14 The PPA is the product of extensive good faith negotiations between PG&E and
15 Hummingbird, following a competitive bidding process, and public disclosure of the PPA would
16 cause substantial harm to both parties and create an unfair advantage for potential competitors
17 seeking to enter into similar agreements. The PPA contains highly sensitive commercial
18 information and is subject to robust confidentiality provisions negotiated and agreed between
19 PG&E and Hummingbird. Disclosure of this information would put the parties at a competitive
20 disadvantage by constraining their ability to negotiate capacity storage agreements in future
21 transactions. Further, compelling public disclosure of the PPA or its terms in the Motion Papers
22 could have a chilling effect that discourages other potential transaction counterparties from
23 entering into similar agreements with the parties in the future.

24 V. NOTICE

25 Notice of the Motion to File Under Seal will be provided to (i) the Debtors and counsel
26 to the Debtors; (ii) counsel to the Office of the United States Trustee for Region 17; (iii) counsel
27 to the administrative agent under the Debtors' debtor-in-possession financing facility; (iv)
28 counsel to the collateral agent under the Debtors' debtor-in-possession financing facility; (v)

1 counsel to the CPUC; (vi) the U.S. Nuclear Regulatory Commission; (vii) the U.S. Department
2 of Justice, as counsel for the United States on behalf of the Federal Energy Regulatory
3 Commission; (viii) counsel for the Official Committee of Unsecured Creditors, Milbank, LLP,
4 55 Hudson Yards, New York, NY 10001-2163, Attn: Dennis F. Dunne and Samuel A. Khalil,
5 and, Milbank, LLP, 2029 Century Park East, 33rd Floor, Los Angeles, CA 90067, Attn: Paul S.
6 Aronzon, Gregory A. Bray, Thomas R. Kreller; (ix) proposed counsel for Official Committee of
7 Tort Claimants, Baker & Hostetler, LLP, 11601 Wilshire Blvd., Suite 1400, Los Angeles, CA
8 90025-0509, Attn: Eric. E. Sagerman and Lauren T. Attard, and Baker & Hostetler, LLP, 1160
9 Battery Street, Suite 100, San Francisco, CA 94111, Attn: Robert A. Julian, Cecily A. Dumas;
10 and (x) those parties who have requested notice pursuant to Fed. R. Bankr. P. 2002. esVolta
11 respectfully submits that no further notice is required.

12 VI. CONCLUSION

13 For the reasons stated in this Memorandum of Points and Authorities, esVolta respectfully
14 requests that the Court enter an order (i) granting this Motion; (ii) authorizing esVolta to file the
15 PPA and unredacted versions of the Motion Papers under seal; and (iii) granting such other and
16 further relief as is just and proper.

1 Dated: March 20, 2019

HOGAN LOVELLS US LLP

2 By: /s/ Erin N. Brady

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16 **COUNSEL FOR PARTY IN INTEREST**
17 **ESVOLTA, LP**

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Exhibit A
Proposed Order

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PG&E CORPORATION
- and -
**PACIFIC GAS AND
ELECTRIC COMPANY,**
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Bankruptcy Case
No. 19 – 30888 (DM)
Chapter 11
(Lead Case)
(Jointly Administered)

**[PROPOSED] ORDER PURSUANT TO 11
U.S.C. §§ 105(a) and 107(b) AND FRBP 9018
FOR ENTRY OF AN ORDER
AUTHORIZING ESVOLTA, LP TO FILE
CERTAIN CONTRACTS AND RELATED
FILINGS UNDER SEAL**

- ☐ **Affects PG&E Corporation**
☒ **Affects Pacific Gas and Electric
Company**
☐ **Affects both Debtors**

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Objections Due: **April 3, 2019, 4:00 p.m.**

***All papers shall be filed in the Lead
Case, No. 19-30088 (DM)**

1 Upon the Motion, dated March 20, 2019 (the “Motion to File Under Seal”), of esVolta, LP
2 (“esVolta”), pursuant to Sections 105(a) and 107(b) of the Bankruptcy Code¹ and Rule 2018 of the
3 Bankruptcy Rules for authority to file the PPA and unredacted versions of the Motion Papers
4 under seal, all as more fully set forth in the Motion to File Under Seal [Dkt.[●]]; and this Court
5 having jurisdiction to consider the Motion to File Under Seal and the relief requested therein
6 pursuant to 28 U.S.C. §§ 157 and 1334, the *Order Referring Bankruptcy Cases and Proceedings*
7 *to Bankruptcy Judges*, General Order 24 (N.D. Cal.) and Bankruptcy Local Rule 5011-1(a); and
8 consideration of the Motion to File Under Seal and the requested relief being a core proceeding
9 pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C.
10 §§ 1408 and 1409; and the Court having found and determined that notice of the Motion to File
11 Under Seal as provided to the parties listed therein is reasonable and sufficient under the
12 circumstances, and it appearing that no other or further notice need be provided; and this Court
13 having reviewed the Motion to File Under Seal and the Mann Declaration; and this Court having
14 determined that the legal and factual bases set forth in the Motion to File Under Seal establish just
15 cause for the relief granted herein; and it appearing that the relief requested in the Motion to File
16 Under Seal is in the best interests of esVolta, the Debtors, their estates, creditors, shareholders,
17 and all parties in interest; and upon all of the proceedings had before this Court and after due
18 deliberation and sufficient cause appearing therefor,

19 **IT IS HEREBY ORDERED THAT:**

- 20 1. The Motion to File Under Seal is granted as provided herein.
- 21 2. esVolta is authorized to file the PPA and unredacted copies of the Motion Papers
22 under seal pursuant to Section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018.
- 23 3. The PPA and the unredacted Motion Papers are confidential, shall remain
24 under seal, and shall not be made available to anyone without the consent of esVolta and the
25 parties thereto, except that copies shall be provided to the Court on a strictly confidential basis.
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28 ¹ Capitalized terms used but not otherwise herein defined shall have the meanings ascribed to such terms in the Motion to File Under Seal.

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4. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. esVolta is authorized to take all steps necessary or appropriate to carry out this Order.

6. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

****END OF ORDER****